Filed 2/26/04

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. FELIPE MANUEL FUENTES, Defendant and Appellant.	G030438 (Super. Ct. No. 01WF1424) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard W. Stanford, Jr., Judge. Affirmed as modified.

Brett Harding Duxbury, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Gil P. Gonzalez and Ronald A. Jakob, Deputy Attorneys General, for Plaintiff and Respondent.

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* Sections 1, 3, 4, 5, and 6 of the Discussion portion of this opinion are not certified for publication. (See Cal. Rules of Court, rules 976 (b), 976.1.)

Is battery a lesser included offense of robbery where the accusatory pleading alleges the taking was accomplished by force *and* fear? In the published portion of this opinion, we answer that question affirmatively. However, we conclude the trial court's error in failing to instruct the jury on battery was not reversible here.

In the unpublished portion of this opinion, we consider the numerous other issues Fuentes raises in this appeal. None is meritorious, save his claim to 37 days of presentence conduct credit. We affirm the judgment, with a modification reflecting that credit.

FACTS

On two different nights in June, 2001, Fuentes and two accomplices committed the crimes described below. One of these accomplices, Stephanie Phillips, was apprehended and tried with Fuentes, and convicted of the same offenses. Her appeal, decided separately, raises many of the identical issues Fuentes raises here. (*People v. Phillips* (Feb. 26, 2004, G030203) [nonpub. opn.].) Police failed to apprehend the third accomplice, identified as "Henry" in a surreptitiously recorded postarrest conversation between Fuentes and Phillips.

1. The Casillas and Quezada robberies

At about 1:30 a.m. on June 12, 2001, Juan Casillas and Mario Quezada left a dance club and drove to a gas station where they happened to encounter Stephanie Phillips. After flashing her breasts at the two men, she approached and asked if they were interested in having sex for money. Phillips climbed into Casillas's truck and directed the men to drive to a dark, secluded spot.

Once Casillas parked the truck, it was quickly "surrounded" by two or three people. Quezada tried to run from the truck but a man holding a baseball bat grabbed Quezada and threw him to the ground. The man with the bat said he would hit Quezada if he moved. Phillips tied Quezada's hands behind his back and someone took his boots, wallet, and watch, among other things.

Meanwhile, Fuentes, who was standing on the driver's side of the truck, pointed a handgun at Casillas, still sitting in the driver's seat. Fuentes took Casillas's watch, wallet, gold chains, and car stereo. Someone tied Casillas's hands behind his back. Fuentes warned Casillas they would find him and he would "get a bullet" if he contacted the police.

After the perpetrators left, Casillas and Quezada were able to untie themselves. They went home without reporting the incident to the police.

2. *The Pham robbery*

At about 2:00 a.m. on June 15, Minh Pham was sitting in his car in a restaurant parking lot when Phillips approached and asked if he had some drugs. He said he did, and agreed to go with her to her house to smoke crack.[1] During the drive, Phillips told Pham she needed to go pick up a key and directed him to drive to a spot near where she took the first two victims. When they arrived there, Pham and Phillips got out of the car and immediately Fuentes and another man attacked Pham from behind. Two people happened to be parked nearby and, upon seeing the ambush unfold, promptly telephoned 911 to summon police.

Fuentes hit Pham in the head with a baseball bat and the other man, identified later as "Henry," struck Pham's head with the butt of a handgun. The two attackers knocked him to the ground and continued hitting his head and face with their weapons. Pham tried to get back in his car to drive away, but Fuentes pursued Pham into the car, striking him with his fists.

Pham, who was high on drugs at the time and believed he was going to be killed, fought back desperately, hitting Fuentes and kicking at him. At one point Phillips joined in the melee, leaning into the car and grabbing the car keys out of Pham's hand.

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[1] On the night of the incident, Pham told the investigating officer he drove off with Phillips in order to have sex for money. At the preliminary hearing, however, Pham changed his story and said the two of them agreed to do drugs together.

All the while, Pham was yelling and screaming for help. While Fuentes and Pham struggled inside the car, Henry was standing outside, pointing the gun at Pham's head. Fuentes called to Henry to "shoot him," but Phillips said, "Don't shoot him."

Pham pushed Fuentes out of the car and Fuentes grabbed the bat, trying first to "poke" Pham with it, and then smashing it into the car's windows and headlights. Henry ran from the scene just before the authorities arrived. Phillips and Fuentes then ran but were quickly apprehended. Pham was found lying on the ground with his legs and feet in the car, bleeding from head and face injuries. Pham was taken to the hospital for treatment. A blood test revealed the presence of methamphetamine, cocaine, and marijuana in his system.

Before Pham was transported from the scene of the crime, a deputy sheriff asked him if his attackers had taken anything from him. Pham said no. The deputy searched Pham and found his wallet, money inside, in his pocket. At the preliminary hearing, however, Pham testified that Fuentes took two $5 bills from Pham's pocket during their struggle inside the car, but that Pham succeeded in grabbing one of the bills back.

The officer who searched Fuentes upon his arrest found, among other items in Fuentes's pockets, a $5 bill and Casillas's ATM card. At trial, the deputy sheriff who inventoried the items seized from Fuentes testified the $5 bill "had a blood splatter on it, or what appeared to be blood." No evidence was presented at trial of any forensic analysis of the bill to determine if the stain or mark on the bill was blood.

Prosecutors charged Fuentes and Phillips with robbery as to Casillas and Quezada in counts one and two, and robbery and attempted murder as to Pham in counts three and four, respectively. Additionally, prosecutors alleged Fuentes was armed during the commission of all the offenses (Pen. Code, § 12022, subd. (a)(1)),[2] personally used a

[2] All further statutory references are to the Penal Code, unless otherwise indicated.

firearm during commission of counts one and two (§ 12022.53, subd. (b)), and personally used a deadly weapon during commission of counts three and four (§ 12022, subd. (b)(1)). Prosecutors also alleged Fuentes had served a prior prison term and had two prior strikes within the meaning of the "Three Strikes" law.

At the preliminary hearing, Pham initially invoked his 5th Amendment right not to testify, in light of pending drug possession charges stemming from the events of the night he was attacked. After the court granted him immunity, Pham testified. At trial, Pham again refused to testify. Over defense objections, the court ruled Pham was unavailable as a witness and allowed his preliminary hearing testimony to be used.

The jury convicted Fuentes of the three robbery counts, but acquitted him of attempted murder. It found true all the armed and weapon use allegations, as well as the prior conviction and prison term allegations.

DISCUSSION

1. *The trial court properly denied Fuentes's Wheeler/Batson motions for lack of a prima facie showing of group bias.*

During jury selection, Fuentes objected to the prosecutor's exercise of five of his peremptory challenges, asserting the prosecutor was intentionally excluding Hispanic jurors in violation of *People v. Wheeler* (1978) 22 Cal.3d 258 and *Batson v. Kentucky* (1986) 476 U.S. 79. The trial court denied the *Wheeler/Batson* motions, finding Fuentes failed in each of these motions to meet his burden of establishing a prima facie case of discrimination. On appeal, Fuentes contends that finding was erroneous. We disagree.

As our high court noted in *People v. Wheeler*, *supra*, 22 Cal.3d at p. 275, "[T]he law recognizes that a peremptory challenge may be predicated on a broad spectrum of evidence suggestive of juror partiality. The evidence may range from the obviously serious to the apparently trivial, from the virtually certain to the highly speculative." Thus, "jurors may be excused based on 'hunches' and even 'arbitrary'

exclusion is permissible, so long as the reasons are not based on impermissible group bias. [Citation.]" (*People v. Turner* (1994) 8 Cal.4th 137, 165.)

The party alleging impermissible group exclusion (*Wheeler/Batson* error) has the burden of establishing a prima facie case of discrimination. The requisite elements of such a showing include proof that "the persons excluded are members of a cognizable group" and that "all the circumstances of the case . . . show a strong likelihood that such persons are being challenged because of their group association rather than because of any specific bias." (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 280.) "[A] 'strong likelihood' means a 'reasonable inference.' [Citations.]" (*People v. Box* (2000) 23 Cal.4th 1153, 1188, fn. 7.) If the court finds a prima facie case of discrimination is established, the burden shifts to the party exercising the peremptory challenge to show the absence of discrimination. (*People v. Alvarez* (1996) 14 Cal.4th 155, 193.)

An appellate court affords "'considerable deference'" to a trial court's finding that a *Wheeler/Batson* motion fails to establish a prima facie case of group bias. (*People v. Howard* (1992) 1 Cal.4th 1132, 1155.) The reviewing court must affirm the trial court's denial of the *Wheeler/Batson* motion "'if the record "suggests grounds upon which the prosecutor might reasonably have challenged" the jurors in question[.]' [Citations.]" (*People v. Davenport* (1995) 11 Cal.4th 1171, 1200.) Stated differently, if the appellate court "can divine any nondiscriminatory basis for the challenges," it must affirm the denial of the *Wheeler/Batson* motion. (*People v. Trevino* (1997) 55 Cal.App.4th 396, 409.)

Applying this deferential standard of review, we find the record supports the trial court's denial of Fuentes's *Wheeler/Batson* motions. As to the five peremptory challenges questioned by Fuentes in his motions, the record establishes a reasonable, race-neutral basis for the prosecutor's excusing each of these jurors.

Juror No. 4 (Ms. Molina) had previously served on a jury that acquitted the defendant of an assault charge. Prior service on a jury that voted to acquit is a proper, nondiscriminatory ground for exclusion by peremptory challenge. (See *United States v. Thompson* (9th Cir. 1987) 827 F.2d 1254, 1260 ["Excluding jurors because . . . they acquitted in a prior case . . . is wholly within the prosecutor's prerogative. . . . Such reasons may not be logical, but that's what peremptory challenges are all about"].)

Juror No. 16 (Ms. Torres) was unemployed. Cases hold that a prospective juror's lack of employment is a permissible, race-neutral basis for a peremptory challenge. (See *Stubbs v. Gomez* (9th Cir. 1999) 189 F.3d 1099, 1106; *United States v. Brown* (7th Cir. 1994) 34 F.3d 569, 572.) As for Juror No. 11 (Ms. Carillo), the unforthcoming manner in which she responded during voir dire was a sufficient basis for the prosecutor to excuse her. Carillo refused to elaborate on the information she provided in her juror questionnaire, and gave curt, one-word answers to the court's questions. (See *Stubbs v. Gomez*, *supra*, 189 F.3d at p. 1105 [demeanor and lack of eye contact showing disinterest in being a juror are valid, race-neutral explanations for excluding juror]; *People v. Davenport*, *supra*, 11 Cal.4th at p. 1203 [peremptory challenge properly made in response to demeanor of prospective juror].)

Juror No. 6 (Ms. Guzman), who, by the way, both the prosecutor and court believed to be *Asian* with a Hispanic surname, expressed a general skepticism about the truthfulness of witnesses testifying under oath. Given that all the witnesses in the case were prosecution witnesses, Guzman's skepticism toward witnesses would benefit the defense and disadvantage the prosecution. This was a legitimate, nondiscriminatory basis for excusing her as a juror.

Finally, a prospective alternate juror (Ms. Rodriguez) expressed sympathy for the accused, based on her personal experience as the sister of a prisoner serving a Two Strike sentence for robbery. Fuentes concedes "there were reasonable grounds for excluding" Rodriguez, but asserts the prosecutor excused her "*at least in part* because of

her race." This argument ignores the applicable standard of review: We must affirm the trial court's denial of the *Wheeler/Batson* motion if there is "*any* nondiscriminatory basis for the challenge[]." (*People v. Trevino*, *supra*, 55 Cal.App.4th at p. 409, italics added.) Consequently, our inquiry into the prosecutor's challenge to Rodriguez ends with the discovery she was admittedly biased in favor of the accused. That was a permissible, nondiscriminatory basis for exclusion.

We note that Fuentes's claims of discrimination were based entirely on the fact the prosecutor had used a "disproportionate" number of his peremptory challenges against Hispanics. Case law rejects such a method of showing group bias. "It is well established that a prima facie case cannot be shown solely on the basis that the prosecutor used peremptory challenges against a disproportionate amount of members of a minority group." (*People v. Buckley* (1997) 53 Cal.App.4th 658, 669, fn. 26, citing *People v. Howard*, *supra*, 1 Cal.4th at p. 1154 [a showing that the prosecutor excused the only two African-Americans on the panel "offers little practical assistance to the trial court, which must determine from 'all the circumstances of the case' whether there is 'a strong likelihood' juror exclusion is due to group bias].)

It is also important to note that when the prosecutor exercised his peremptory challenge against Rodriguez as the alternate, four Hispanics remained on the jury. This fact further undercuts Fuentes's argument that the five jurors at issue here were excluded for reasons of group bias. (*People v. Buckley*, *supra*, 53 Cal.App.4th at p. 661 [where *Wheeler* motion challenged exclusion of two African-American jurors, it was "a pertinent fact" that the jury that was ultimately impaneled contained one African-American juror]; *People v. Dunn* (1995) 40 Cal.App.4th 1039, 1053-1054.)

We conclude the trial court properly denied each of Fuentes's *Wheeler/Batson* motions for lack of a prima facie showing of group bias.

2. The trial court erred in failing to instruct the jury on battery as a lesser included offense of the robbery as pleaded.

Fuentes argues the trial court erred in refusing his request to instruct the jury on simple battery as a lesser included offense of robbery as charged against him. He contends this error requires reversal of his conviction for the robbery of Pham because substantial evidence shows Fuentes battered Pham but took nothing from him. "[A] trial court must instruct the jury sua sponte on an uncharged offense that is lesser than, and included in, a greater offense with which the defendant is charged only if there is substantial evidence that, if accepted, would absolve the defendant from guilt of the greater offense but not the lesser." (*People v. Waidla* (2000) 22 Cal.4th 690, 737.) Fuentes does not challenge his other two robbery convictions based on this same instructional error because there was no evidence he battered Quezada and Casillas without taking their property.

For the reasons explained below, we conclude Fuentes was indeed entitled to an instruction on battery as a lesser included offense of the charged robbery of Pham.[3] We further conclude, however, the trial court's refusal to give that instruction did not constitute reversible error in this case.

A crime is a lesser included offense of another "if it meets either of the following tests: 1) 'Legal elements' test: The greater statutory offense cannot be committed without committing the lesser offense because all the elements of the lesser offense are included in the elements of the greater; 2) 'Accusatory pleadings' test: The charging allegations of the accusatory pleading include language describing the offense in such a way that if committed in that manner the lesser offense must necessarily be committed. [Citation.]" (*People v. Stewart* (2000) 77 Cal.App.4th 785, 795.)

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[3] In light of this holding, we need not consider Fuentes's alternative claim the trial court should have instructed the jury on battery as a lesser *related* offense of the robbery.

Though "[b]y statute, a robbery may be committed by a taking [of property] from the person of another by means of force *or* fear" (*People v. Wright* (1996) 52 Cal.App.4th 203, 209 (*Wright*); § 211), the accusatory pleading alleged Fuentes used force *and* fear in committing the robbery of Pham.[4] According to the pleading, then, force was used in the robbery. Force is also an element of the crime of battery. "A battery is any willful and unlawful use of force or violence upon the person of another." (§ 242.) The parties to this appeal agree that, under the accusatory pleading test, battery is a lesser included offense of the charged robbery *if* the element of force required for robbery is also sufficient force for battery.[5]

Surprisingly, we have found no California case that considers this question. Compelled to find our own answer, we begin by considering the nature of "force" as an element in these two discrete crimes.

The element of "force" in robbery is elucidated in several cases where the lesser included offense in issue was not battery but grand theft from the person. In *People v. Morales* (1975) 49 Cal.App.3d 134 (*Morales*), the court explained that "[w]here the element of force or fear is absent, a taking from the person is only . . . grand theft[.]" (*Id*. at p. 139, fn. omitted.) *Morales* involved a purse snatching which resulted in a first degree murder charge when the elderly victim, who fell during the incident, died as an indirect result of a fractured elbow suffered in her fall. The trial court had refused the defendant's requested jury instructions on grand theft from the person, and the jury convicted him of robbery and first degree felony murder. The appellate court reversed on the ground the jury should have been instructed on the lesser included offense of grand theft "because the evidence was such that the jury might have entertained a reasonable

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4 We acknowledge prosecutors, in filing robbery charges, routinely plead the elements of force and fear conjunctively.

5 Because robbery can be committed by using fear alone, it does not encompass battery as a lesser offense under the legal elements test.

doubt as to whether defendant used sufficient force in his snatching of the purse for the theft to constitute robbery." (*Id.* at p. 138.)

After noting the lack of precise standards for determining "how much force is required to elevate a taking from the person to the status of a robbery," the court articulated a sort of "minimum requirement" test. The court stated that, to prove sufficient force for robbery, "something more is required than just that quantum of force which is necessary to accomplish the mere seizing of the property." (*Morales*, *supra*, 49 Cal.App.3d at p. 139.)

In *People v. Mungia* (1991) 234 Cal.App.3d 1703 (*Mungia*), the court elaborated on the test announced in *Morales*. The court said there is sufficient force for robbery if the defendant used "more force than necessary to accomplish the taking . . . or, stated another way, . . . defendant engage[d] in a measure of force at the time of taking to overcome the victim's resistance[.]" (*Mungia*, *supra*, 234 Cal.App.3d at p. 1708.) The court further observed, "'The terms "force" and "fear" as used in the definition of the crime of robbery have no technical meaning peculiar to the law and must be presumed to be within the understanding of jurors.' [Citation.] [¶] 'Force' is a relative concept. An able-bodied and/or large person may experience a given physical act applied to her body as less forceful than would a feeble, handicapped or small person." (*Id.* at pp. 1708-1709.) The court concluded that because "'force' is a factual question to be determined by the jury using its own common sense[,]" the jury could consider the victim's physical characteristics vis-à-vis the attacker's "in determining whether the physical act applied to the victim constituted 'force' within the meaning of section 211[.]" (*Ibid.*)

More recently, in *People v. Garcia* (1996) 45 Cal.App.4th 1242 (*Garcia*), the court applied the principles from *Morales* and *Mungia* in determining whether the force the defendant used in pushing aside a cashier in order to take money from an open register drawer was sufficient force for robbery. The court stated: "[T]he touching was

more than incidental and was not merely the force necessary to seize the money. The defendant did not simply brush against the cashier as he grabbed for the money. He intentionally pushed against her to move her out of the way so he could reach into the register. In terms of *Morales*, pushing the cashier went beyond the 'quantum of force which [was] necessary' to grab the money out of the cash register." (*Garcia*, *supra*, 45 Cal.App.4th at p.1246.)

It is important to note the existence of another case published the same year as *Garcia* which also discussed the element of force in robbery but veered sharply away from precedent in its conclusions. At issue in *Wright*, *supra*, 52 Cal.App.4th 203, was whether assault is a lesser included offense of robbery where the use of force is pleaded. In analyzing that question, the court began with the assumption that "force" in robbery is something "more than the direct (or indirect) application of physical might to the person of the victim[.]" (*Id*. at p. 210.) The court boldly asserted, "'Force[]' . . . has a broader meaning[,]" and went on to define force so as to subsume the statutory element of "fear."

The court stated, "Generally, 'the force by means of which robbery may be committed is either actual or constructive. The former includes all violence inflicted directly on the persons robbed; the latter encompasses all . . . means by which the person robbed is put in fear sufficient to suspend the free exercise of . . . will or prevent resistance to the taking.' (67 Am.Jur.2d, Robbery, § 22, p. 77.) This 'constructive force' means 'force, not actual or direct, exerted upon the person robbed, by operating upon [a] fear of injury . . . .' (*Id*., § 24, p. 79.)" (*Wright*, *supra*, 52 Cal.App.4th at p. 210.)

Wright cites no California case that similarly interprets the force in robbery as encompassing both "actual" force ("violence inflicted directly on the persons robbed") and "constructive" force ("all means by which the person robbed is put in fear"). This interpretation is a fairly radical departure. Under this new, "broader" definition of force,

fear ceases to be an independent element. Thus, *Wright* effectively rewrites the robbery statute, collapsing the statutory elements of "force and fear" into one.[6]

There are several problems with this definition of "force" in robbery. First, it violates a basic rule of statutory construction. If the element of "fear" set forth in section 211 is wholly subsumed in "force," then the statutory phrase "by means of force or fear" is redundant. "It is axiomatic we must avoid construction of a statute which renders terms mere surplusage. (*City and County of San Francisco v. Farrell* (1982) 32 Cal.3d 47, 54.)" (*People v. Brookins* (1989) 215 Cal.App.3d 1297, 1309.)

Second, *Wright's* definition also serves to define "fear" in a way that conflicts with another statute. Significantly, section 212 defines the element of fear in robbery as follows: "The fear mentioned in Section 211 may be either: [¶] 1. The fear of an unlawful injury to the person or property of the person robbed, or of any relative of his or member of his family; or, [¶] 2. The fear of an immediate and unlawful injury to the person or property of anyone in the company of the person robbed at the time of the robbery." (§ 212; see also *People v. Wolcott* (1983) 34 Cal.3d 92, 100.) This statute implicitly recognizes fear as an independent element of robbery, with a particular, rather narrow meaning. In contrast, *Wright* defines fear as merely a component of force. Moreover, the *Wright* court describes a more generalized fear as comprising

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[6] By defining force as consisting of the infliction of *either* violence (actual force) or fear (constructive force), the *Wright* court positioned itself to reach the conclusion that "it is possible to commit a robbery by force without necessarily committing an assault." (*Wright*, *supra*, 52 Cal.App.4th at p. 211.) The court's argument goes like this: Because fear is merely a form of force, a robbery accomplished by fear is actually a robbery by force. The use of fear does not require either "an attempt to apply physical force" or "the present ability to apply force" – both elements of assault. (*Ibid*.) Consequently, a robbery by force (the constructive type) can be committed without necessarily committing an assault. Therefore, assault is not a lesser included offense of robbery by force.

"constructive force" ("'fear sufficient to suspend the free exercise of . . . will or prevent resistance to the taking'"; "'fear of injury'"). (*Wright*, *supra*, 52 Cal.App.4th at p. 210.)

Finally, *Wright's* interpretation of force as subsuming fear flies in the face of a wealth of case law that recognizes the two elements in section 211 are distinct. (See, e.g., *People v. Flynn* (2000) 77 Cal.App.4th 766, 771-773 [where prosecution conceded insufficient force for robbery, court reviewed sufficiency of evidence of fear that arose after initial taking]; *People v. Prieto* (1993) 15 Cal.App.4th 210, 215 ["Since appellant used no force against [victim], the question becomes was *fear* used"]; *People v. LeBlanc* (1972) 23 Cal.App.3d 902, 909 [information pleaded robbery "in the conjunctive" (by force and fear) and evidence of demand for money at gunpoint established "there was both 'force' and inferably 'fear'"]; *People v. James* (1963) 218 Cal.App.2d 166, 170 [because there was sufficient evidence of fear, no need to consider whether force was used].)

Wright seems to disregard all these cases and relies on a single California case, *People v. Brookins* (1989) 215 Cal.App.3d 1297 (*Brookins*), as support for its assertion that fear is not an independent element of robbery but merely a type of force. *Wright* cites the following sentence from *Brookins*: "'Although, in most cases, fear is a necessary byproduct of the employment of force, the coercive effect of fear induced by threats to a victim's person or property is in itself a form of force, so that either factor may normally be considered as attended by the other.' [Citation.]" (*Brookins*, *supra*, 215 Cal.App.3d at p. 1309; *Wright*, *supra*, 52 Cal.App.4th at p. 211.)

Upon close inspection, this sentence actually lends no support to *Wright*. The statement recognizes an essential interplay between force and fear: that the use of force will naturally cause fear; in turn, fear, which is inherently coercive, becomes a form of force. Thus, the court in *Brookins* implicitly acknowledges force and fear are independent elements: "'*either* factor'" may attend the other in a robbery, i.e., both

factors (force and fear) may be present. This is a far cry from saying that fear is not an independent element of robbery.

In light of the problematical analysis in *Wright*, we reject its explication of the element of force in robbery. We adopt, instead, the interpretation of force set forth in *Morales* and *Mungia* as involving the application of some measure of physical might against the victim in order to accomplish a taking.

Turning to the element of force in battery, a difference in *degree* is immediately apparent. While robbery involves a quantum of physical force applied against the victim which exceeds a minimum level ("more force than necessary" to accomplish the taking or to overcome the victim's resistance), battery requires a merely token or negligible amount of touching. As the California Supreme Court explained, """"'[T]he least touching' may constitute battery. In other words, *force* against the person is enough, it need not be violent or severe, it need not cause bodily harm or even pain, and it need not leave any mark." [Citation.] [¶] ". . . [It] includes any wrongful act committed by means of physical force against the person of another, even although [*sic*] only the feelings of such person are injured by the act." [Citation.]' [Citation.]" (*People v. Colantuono* (1994) 7 Cal.4th 206, 214, fn 4; see also *County of Santa Clara v. Willis* (1986) 179 Cal.App.3d 1240, 1251, fn. 6 ["The least unprivileged touching may constitute a criminal battery"].)

Case law and logic lead ineluctably to one conclusion: The force needed to commit a robbery is more than the "least touching" required for a battery, and thus will always be enough to commit that lesser crime. Under the accusatory pleading test, then, battery is a lesser included offense of robbery in a case in which the charging document alleges "force and fear."

The People try mightily to dissuade us from this conclusion. Essentially, they assert the force present in robbery does not necessarily constitute a battery because, while "a battery requires either a direct or indirect touching [citation]," "the 'force'

element of robbery can be satisfied *without* touching the victim in any way." Their argument is difficult to follow and ultimately untenable.

The People begin with the premise "assault is a form of force." They offer no legal authority for this statement, nor do they explain it. By statute, an assault is "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.) We thus presume the People are referencing a scenario in which a robber threatens to inflict physical injury in order to accomplish the taking.

The People follow their initial premise with two correct statements of law, to wit: "Pointing a loaded gun at someone in a threatening manner is an assault[;]" and "In proving such an assault, it is immaterial whether or not the victim was afraid." From these statements, the People deduce the following: "Thus, assault with a deadly weapon is an example of force independent of fear."

This initial conclusion, upon which the rest of the argument builds, is plainly illogical. Under the robbery scenario the People have posited, the taking is accomplished by the use of a loaded gun pointed at the victim. While current movies and video games allow characters to exhibit fearlessness in the face of flying bullets (witness, e.g., the character Neo in "*The Matrix*"), it is an undeniable psychological truth that a normal human being threatened at gunpoint will experience fear. The fact fear is not an *element* of assault does not mean fear is absent from the crime. Consequently, we reject the conclusion that the "force" present in this scenario is "independent of fear." A robbery at gunpoint is a taking by means of fear. (See *People v. James*, *supra*, 218 Cal.App.2d 166, 170 [jury could reasonably infer fear from victim's testimony she thought robber had a gun].)[7]

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[7] There are two cases which, without analyzing the issue, describe robbery at gunpoint as involving both force and fear. (See *People v. LeBlanc*, *supra*, 23 Cal.App.3d 902, 909 [where defendant demanded money at gunpoint, "there was both 'force' and inferably 'fear'"]; see also *People v. McChessney* (1940) 39 Cal.App.2d 36, 38.) No case, however, describes such a scenario as involving force without fear.

The rest of the People's argument is similarly flawed. They continue: "Accordingly, robbery by force can be committed by means of an assault with a deadly weapon, *even if the victim is not afraid.* . . . For example, the unexpected assault may initially surprise, startle or divert the attention of the victim so as to allow the robber to gain possession of the victim's property, even though the victim does not believe the gun is loaded or fear that the robber will fire the gun. This would be a robbery accomplished purely through force without committing a battery. [¶] Since a robbery through force . . . can be committed without touching the victim, battery is not a necessarily included offense."

As with the first part of the argument, the logic of this final step does not withstand scrutiny. A robbery, by definition, is a taking accomplished by means of *force or fear*. (§ 211.) Consequently, a taking accomplished by *surprising*, *startling*, or *diverting the attention* of the victim is no robbery. Thus, the "example" meant to prove "a robbery through force . . . can be committed without touching the victim" fails to do so. Failing along with it is the People's conclusion that robbery by force does not include battery. As stated earlier, we conclude battery is a lesser included offense of robbery by force.

This conclusion, however, does not resolve the question of whether a battery instruction was required in the present case. "[W]hether the trial court erred in failing to give an instruction on the lesser included offense turns on whether there was some evidentiary basis on which the jury could have found the offense to be less than robbery." (*Garcia*, *supra*, 45 Cal.App.4th at p. 1246; see also *People v. Waidla*, *supra*, 22 Cal.4th at p. 737 [court must instruct on lesser included offense "if there is substantial evidence that, if accepted, would absolve the defendant from guilt of the greater offense but not the lesser"].)

That test is met here. When a deputy sheriff questioned Pham at the scene, Pham stated his attackers had taken nothing from him. The deputy searched Pham's

clothing and found his wallet, which had money in it. These facts constitute substantial evidence a taking did not occur. Consequently, the jury should have been given the option of convicting Fuentes of battering Pham rather than robbing him, and the court's failure to instruct the jury on battery was error.

In a noncapital case, a trial court's failure to instruct on a lesser included offense is state error, subject to review under the standard articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Breverman* (1998) 19 Cal.4th 142, 165.)[8] Under that standard, reversal of the conviction is required if "an examination of the entire record establishes a reasonable probability that the error affected the outcome." (*Ibid*.) After carefully considering the record in this case, we conclude reversal is not warranted.

In his preliminary hearing testimony, read aloud at trial, Pham said Fuentes grabbed two $5 bills from his pocket while they fought inside the car. Pham further stated he got one of the bills back, leaving Fuentes in possession of the other. This testimony was corroborated by a deputy sheriff who testified a $5 bill found on Fuentes's person at the time of his arrest had an apparent "blood splatter" on it. The jury could reasonably infer this blood-smeared bill came from Pham, who sustained a gaping head wound in the attack. This testimony and physical evidence strongly supported the jury's finding a taking occurred.

The only contrary evidence was Pham's statement at the scene that his attackers took nothing from him. However, Pham's circumstances at the time he made

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[8] Fuentes argues *People v. Breverman*, *supra*, 19 Cal.4th 142 is distinguishable and urges us to find the instructional error here to be of constitutional dimension, thus triggering application of the federal standard of review. (See *Chapman v. California* (1967) 386 U.S. 18, 24 [error is reversible unless harmless beyond reasonable doubt].) But Fuentes's argument for distinguishing the cases (here the defendant requested instruction on the lesser included offense but the defendant in *Breverman* did not) is unpersuasive. We are thus bound to follow the rule set forth by our state high court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

the statement undercut its credibility: Pham was high on drugs, bleeding profusely from the head, and in police custody. The jury likely concluded Pham had greater concerns at that moment than remembering the theft of a $5 bill. Furthermore, the fact Pham's wallet was undisturbed during the attack does not disprove Fuentes's theft of the cash. With no additional testimony on the subject, the jury was free to infer Pham carried the two loose $5 bills separately from his wallet.

Of course, Fuentes rightly assails the credibility of Pham's preliminary hearing testimony. Pham was in custody at the time he testified, awaiting prosecution on drug charges. He was a drug addict who had suffered seven prior felony theft and drug convictions. Additionally, Pham's testimony differed in some respects from what he told officers at the scene. The most striking discrepancy, of course, was his crucial testimony about Fuentes's theft of the $5 bill.

Nevertheless, considering the evidence as a whole, we find no reasonable probability the jury would have convicted Fuentes of battery rather than robbery, if instructed on both crimes. The evidence supporting the finding a theft occurred "is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result." (*People v. Breverman*, *supra*, 19 Cal.4th at p. 177.) Consequently, we must affirm the robbery conviction on count three.

3. *The trial court properly instructed the jury as to the deadly weapon use enhancement*.

The jury found true the allegation Fuentes used a deadly weapon in committing count three. Fuentes claims instructional error invalidates that finding. Specifically, he contends the trial court erred in failing to instruct the jury that aiding and abetting principles do not apply to a deadly weapon use enhancement. We find no error.

Fuentes concedes the court correctly instructed the jury on the deadly weapon use enhancement as follows: "It is alleged in counts 3 [robbery] and 4 [attempted murder] that in the commission or attempted commission of the crime

charged, the defendant Fuentes *personally* used a deadly or dangerous weapon. [¶] If you find the defendant guilty of either [of] the crimes thus charged, you must determine whether the defendant *personally* used a deadly or dangerous weapon in the commission or attempted commission of the crimes. [¶] . . . [¶] The term '*personally used* a deadly or dangerous weapon,' as used in this instruction, means the *defendant* must have intentionally displayed a weapon in a menacing manner or intentionally fired it or intentionally struck or hit a human being with it. [¶] The People have the burden of proving the truth of this allegation. . . . [¶] Include a special finding on that question in your verdict, using a form that will be supplied for that purpose." (CALJIC No. 17.16 (6th ed. 1996), italics added.)

The problem, according to Fuentes, is that the court also instructed the jury with CALJIC No. 3.00 (6th ed. 1996). That instruction told the jury "[t]hose who aid and abet the commission of the crime" are "equally guilty" as "[t]hose who directly and actively commit the act constituting the crime." In other words, this instruction tells jurors there are two classes of "principals," both "equally guilty" of the crime charged. Fuentes asserts the jurors probably understood CALJIC No. 3.00 as allowing a true finding on the deadly weapon use allegation based not on Fuentes's own use of such a weapon, but rather on his aiding and abetting another's use of one. We disagree with Fuentes's assertion jurors likely misinterpreted the jury instructions in this way.

The aiding and abetting instruction given here defined aiders and abettors as principals only for purposes of determining guilt for the underlying crimes. The language of the instruction does not suggest aiding and abetting principles apply outside this context of determining culpability for a criminal offense. As the People point out in their brief, the aiding and abetting instruction contained "no reference to enhancements, weapon allegations or special findings[.]"

As for the deadly weapon use enhancement allegation, the language of CALJIC No. 17.16 makes clear a true finding requires that the defendant "personally

used" the weapon. The language of CALJIC No. 17.16 focuses the jury's inquiry distinctly on the defendant's personal conduct in intentionally displaying, firing, or hitting a person with the deadly weapon. Contrary to Fuentes's suggestion, the instruction does not allow for a finding of guilt for vicarious weapon use. We presume the jury followed the instructions given to them. (*People v. Osband* (1996) 13 Cal.4th 622, 714.)

In considering "the entire charge" to the jury, we do not think it reasonable to assume, as Fuentes does, the jury understood the aiding and abetting instruction as applying to the weapon use allegation. Because there is no "'reasonable likelihood' the jury understood the instructions as the defendant asserts[,] [citation]" we find no instructional error as to the deadly weapon use allegation. (*People v. Cain* (1995) 10 Cal.4th 1, 36.)

4. *The trial court properly allowed Pham's preliminary hearing testimony to be used at trial.*

Pham's preliminary hearing testimony that Fuentes took a $5 bill from him during their struggle in the car was crucial evidence supporting the robbery conviction in count three. Fuentes argues that former testimony should not have been admitted at trial because Pham was not "unavailable as a witness" within the meaning of Evidence Code section 240. We disagree.

Pham testified at the preliminary hearing only after the court unilaterally granted him transactional immunity. The prosecution had offered Pham use immunity at the preliminary hearing, but Pham rejected that offer, and the prosecution was unwilling to accede to Pham's demand for full transactional immunity. Before trial, the prosecution learned Pham intended to refuse to testify at trial unless again given transactional immunity. The prosecution opposed this request as well, and sought instead to use Pham's prior testimony under an exception to the hearsay rule for "unavailable" witnesses.

Evidence Code section 1291 provides in pertinent part as follows: "(a) Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and: [¶] . . . [¶] (2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing."

Evidence Code section 240 provides that a declarant is "'unavailable as a witness'" if "[e]xempted or precluded on the ground of privilege from testifying concerning the matter to which his or her statement is relevant."

The trial court found Pham "unavailable" within the meaning of Evidence Code section 240 by virtue of his decision to invoke his Fifth Amendment privilege not to incriminate himself by testifying at Fuentes's trial. Moreover, the court concluded Pham's preliminary hearing testimony qualified for the hearsay exception in Evidence Code section 1291.

Fuentes argues the trial court erred in finding Pham "unavailable as a witness." Fuentes contends an exception set forth in Evidence Code section 240 applies to prevent a finding that Pham was unavailable. That exception is as follows: "A declarant is not unavailable as a witness if the exemption, preclusion, disqualification, death, inability, or absence of the declarant was brought about by the procurement or wrongdoing of the proponent of his or her statement for the purpose of preventing the declarant from attending or testifying." (Evid. Code, § 240, subd. (b).) Fuentes makes the striking assertion the People wrongfully "procured [Pham's] absence" by refusing to offer him transactional immunity at trial, thereby intentionally depriving Fuentes of his constitutional right to confront his accuser before the jury. The assertion lacks merit.

We begin by pointing out Fuentes did exercise his right of confrontation. At the preliminary hearing, the attorneys for both Fuentes and Phillips thoroughly

cross-examined Pham, pointing out the inconsistencies in his story (particularly the discrepancy between his testimony concerning the stolen $5 bill and his on-scene denial a theft occurred), as well as his shady past, including prior felony convictions and chronic drug abuse. While Fuentes rightly asserts the jury was unable to "evaluate Pham's demeanor" on the stand, Pham's evasiveness, inconsistencies, and general weakness as a witness were fully revealed by the reading of his preliminary hearing testimony into the record at trial.

Moreover, there is no basis for Fuentes's assertion the People improperly "procured" Pham's absence at trial by not offering him transactional immunity. Fuentes is simply wrong in his suggestion the People chose to withhold a grant of immunity at trial only because they had "already reaped the benefit of getting Pham's testimony memorialized." To the contrary, the People's position concerning a grant of immunity to Pham was consistent throughout the case. The prosecution opposed giving transactional immunity to Pham at the preliminary hearing as well as at trial.

Pham testified at the preliminary hearing only because the trial court unilaterally granted him transactional immunity. The People did not engineer that grant of immunity, though they did benefit from it. However, taking advantage of this opportunity to obtain Pham's testimony is a far cry from the nefarious "selective" grant of immunity and "deliberate" distortion of "the judicial fact finding process" that Fuentes makes it out to be.

In conclusion, we reject Fuentes's assertion the People wrongfully procured Pham's absence at trial by refusing to grant him transactional immunity. It follows that the trial court properly found Pham unavailable as a witness and ruled his former testimony admissible at trial.

5. *The trial court properly made certain determinations as to the prior conviction allegations.*

Fuentes argues the trial court erred in refusing to let the jury decide the issues of identity and whether his alleged prior convictions constituted strikes within the meaning of the Three Strikes law. Fuentes is wrong.

The California Supreme Court has made clear there is no federal or state constitutional right to a jury trial on prior conviction allegations. (*People v. Epps* (2001) 25 Cal.4th 19, 23 (*Epps*), citing *Aprendi v. New Jersey* (2000) 530 U.S. 466, 490.) Any such right derives solely from statute. (*Ibid*.) In *Epps*, *supra*, 25 Cal.4th at p. 25, the Supreme Court specifically held that the question of identity ("whether the defendant *is the person who* has suffered the prior conviction") is for the trial court to decide, pursuant to section 1025, subdivision (c). The high court also reiterated its earlier holding in *People v. Kelii* (1999) 21 Cal.4th 452, 454, 457, "that the question whether a prior conviction is a serious felony for purposes of the three strikes law was also for the court, not the jury." (*Epps*, *supra*, 25 Cal.4th at p. 23.) Consequently, the trial court acted properly in determining these issues, and Fuentes's claim of error fails.

6. *The trial court should have awarded presentence conduct credit to Fuentes.*

Both parties to this appeal agree the trial court erred in delegating its authority to calculate presentence conduct credit to the Department of Corrections. At sentencing, the court awarded Fuentes 253 days of presentence custody credit, but failed to calculate the conduct credit due him, ordering the Department of Corrections to perform the task. This was error.

The trial court is statutorily required to determine and enter on the abstract of judgment the amount of presentence custody credits, including "good behavior" (conduct) credit, to which the defendant is entitled. (§ 2900.5, subd. (d); *People v. Buckhalter* (2001) 26 Cal.4th 20, 30; *People v. Sage* (1980) 26 Cal.3d 498, 508-509.) The computation of custody credit pursuant to the applicable statutory formula is a

non-discretionary, ministerial duty. (*People v. Jack* (1989) 213 Cal.App.3d 913, 917.)

Section 2933.1, subdivisions (a) and (c), limits to "no more than 15 percent" the amount of conduct credit that can be awarded to a person convicted of a "violent" felony, such as robbery (see § 667.5, subd. (c)(9)). (*People v. Duran* (1998) 67 Cal.App.4th 267, 269-270.) Consequently, Fuentes is entitled to 37 days conduct credit (15 percent of 253). We will modify the abstract of judgment accordingly.

DISPOSITION

The judgment is modified to reflect Fuentes is to receive presentence credits of 253 days of actual custody credit plus 37 days of conduct credit for total credits of 290 days. We direct the clerk of the superior court to amend the abstract of judgment accordingly, and to forward a copy of the amended abstract of judgment to the Department of Corrections. In all other respects, we affirm the judgment.

O'LEARY, J.

WE CONCUR:

SILLS, P. J.

BEDSWORTH, J.